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Supreme Court

of the

United States

Case No. 75-284

METROPOLITAN DADE COUNTY, FLORIDA, et al.,
Appellants,

vs.

AEROJET-GENERAL CORPORATION,
Appellee.

On Appeal From The United States Court of Appeals for the Fifth Circuit, Case No. 74-1192

JURISDICTIONAL STATEMENT OF APPELLANTS

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TEXT OF CONSTITUTIONAL PROVISION AND STATUTE CITED

Constitution of the United States

Article I, Section 10:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Florida Statutes, Section 253.111:

The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes.

UNITED STATES CONSTITUTION

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in the

Supreme Court

of the

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Case No.

METROPOLITAN DADE COUNTY, FLORIDA, et al.,
Appellants,

vs.

AEROJET-GENERAL CORPORATION,
Appellee.

On Appeal From The United States Court of Appeals for the Fifth Circuit, Case No. 74-1192

JURISDICTIONAL STATEMENT OF APPELLANTS

I. OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 511 F.2d 710. The opinion of the United States District Court for the Northern District of Florida is reported at 366 F.Supp. 901.

II. JURISDICTION OF THIS COURT

Aerojet-General Corporation (Aerojet) brought suit in the District Court seeking to enjoin Metropolitan Dade County, Florida (Dade County) from instituting or prosecuting any suits in the Florida courts which would contest Aerojet's title to a twenty-five thousand (25,000) acre tract of land located within the heavily populated county. According to the complaint, the District Court's jurisdiction was founded upon the diverse citizenship of the parties (28 U.S.C. §1332) and the existence of a federal question (28 U.S.C. §1331).

After the District Court entered an abstention order, Dade County brought suit in the Eleventh Circuit Court of Florida seeking to quiet its title to the property, which suit was removed by Aerojet to the United States District Court for the Southern District of Florida and later consolidated in the Northern District with Aerojet's prior proceeding.

On November 21, 1973, the District Court, ruling on cross-motions for summary judgment, rendered its decision

favorable to Aerojet. Thereafter on April 21, 1975, the U. S. Court of Appeals rendered an opinion, review of which is sought herein, affirming the District Court. The Court of Appeals, on May 30, 1975, denied Dade County's petition for rehearing and rehearing en banc. Dade County's notice of appeal was filed with the Clerk of the Court of Appeals on June 30, 1975.

Jurisdiction of this appeal is conferred upon this Court by virtue of 28 U.S.C. §1254(2), which pertains to an appeal "by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States . . . " In this instance, jurisdiction exists because the Court of Appeals held that §253.111, Florida Statutes, as interpreted by the Supreme Court of Florida, unconstitutionally impaired the obligations of a 1961 lease-option contract between Aerojet and two State of Florida Boards (the Board of Education and the Board of Trustees of the Internal Improvement Trust Fund). Jurisdiction also exists because the Court of Appeals declined to abide by the implicit holding of the Florida Supreme Court that Dade County's quiet title action was not barred by the doctrine of res judicata.

Cases believed to sustain the jurisdiction of this Court are as follows: *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938); *Atlantic Coast Line Railroad Company v. Phillips*, 332 U.S. 168 (1947); and *Lehman Brothers v. Schein*, 416 U.S. 386 (1974).

The allegedly impairing statute, Section 253.111, Florida Statutes, in pertinent part provides:

> "The board of trustees of the internal improvement trust fund of the state shall not sell or convey any land to which they hold title unless and until they shall afford an opportunity to the county in which such land is situated to receive such land for public purposes . . . " (Enacted by means of §1, Chapter 65-324, Laws of Florida, 1965.)

III. QUESTIONS PRESENTED BY THIS APPEAL

A. Did the Court of Appeals err when it held that the res judicata effect of a prior judgment in a federal specific performance proceeding between Aerojet and the State Boards was to be ascertained under federal rather than Florida law, even though the prior proceeding had been instituted in federal court solely on the basis of diversity of citizenship?

B. Did the Court of Appeals err when it held that §253.111, Florida Statutes, as interpreted by the Supreme Court of Florida in a separate mandamus proceeding involving the 1961 agreement between Aerojet and the State Boards, violated the Impairment of Contractual Obligation Clause of the United States Constitution (Article I, Section 10)?

IV. STATEMENT OF THE CASE

A. *The Lease-Option Agreement*

The State of Florida Board of Education and the State of Florida Board of Trustees of the Internal Improvement Trust Fund (State Boards) are each composed of the following elected officials of the State: Governor, Secretary of State, Attorney-General, Comptroller, Treasurer, Commissioner of Agriculture, and Commissioner of Education. Florida Statutes, §§ 229.012 and 253.02(1). In 1961, the State Boards published in the Homestead News (a newspaper published and circulated in Dade County) a Notice of Bids and Public Sale by means of which bids were solicited for the lease of lands owned by the State Boards in Dade County, Florida.

On December 21, 1961, Aerojet and the State Boards entered into a written lease, with option to purchase, of the described lands. The first paragraph of the agreement stipulated that the leaseholds created thereby were to last ten (10) years. Paragraph 8 of the agreement in pertinent part provided:

> "The Lessor herewith grants to the Lessee the exclusive right, option and privilege to purchase all of the land described herein at any time within the ten (10) year period at and for a price of Fifty Dollars ($50.00) per acre. In the event the Lessee exercises its right, option and privilege to purchase the above described land, the purchase price of said land to be determined by the number of acres multiplied by Fifty Dollars ($50.00),

less the amount of any unearned rent paid by Lessee under the terms of this lease shall be payable as follows:

"(a) Upon the election of Lessee, the total amount of the purchase price to be determined, as aforesaid, shall be paid to Lessor simultaneously with delivery to Lessee of a deed to said lands vesting good and merchantable fee simple title thereto in Lessee *subject to applicable statutory rights and reservations in effect on date of conveyance . . .* " (emphasis supplied)

B. *Aerojet's Investment In The Leased Lands*

Pursuant to the provisions of the December 21, 1961, agreement, Aerojet purchased additional land surrounding the leased lands and began construction of a plant for the development of solid rocket fuels. Aerojet's capital investment eventually totalled $21,200,000, about $2,000,000 of which was located on the lands leased from the State Boards. The plant was completed in the spring of 1964 and was in operation until June, 1967, at which time it ceased operations due to cutbacks in the United States Government's solid rocket fuel research and development program. Since June, 1967, Aerojet has maintained a caretaker force of fourteen people at the plant.

C. *The Enactment of Section 253.111, Florida Statutes, and The Exercise of the Purchase Option*

In 1965, the Florida Legislature enacted §253.111,

Florida Statutes. Several years later, on September 8, 1969, Aerojet notified the State Boards that it had elected to exercise its option to purchase the lands described in the December 21, 1961, agreement. The State Boards, on October 21, 1969, decided not to convey the lands to Aerojet. (Pursuant to §253.03(6), Florida Statutes, since September 1, 1967, the Trustees of the Internal Improvement Trust Fund have been vested with control over the disposition of the subject lands.)

D. *The Specific Performance Action*

On October 21, 1969, Aerojet brought suit in the United States District Court for the Northern District of Florida against the State Boards seeking specific performance of the purchase option contained in the 1961 agreement. *Federal jurisdiction was premised exclusively upon diversity of citizenship, 28 U.S.C. §1332.* The State Boards, on December 1, 1969, interposed two affirmative defenses: (1) that Aerojet had breached the contract by shutting down its operations in June, 1967; and (2) that the remedy of specific performance was inappropriate because the value of the lands involved had appreciated considerably between the execution of the lease and Aerojet's delivery of notice of its election to exercise the purchase option. *Neither party raised the issue of the applicability of §253.111, Florida Statutes, to the 1961 agreement.*

On September 21, 1970, the District Court granted Aerojet's motion for summary judgment against the State Boards. *Aerojet-General Corporation v. Kirk,* N.D. Fla., 1970, 318 F.Supp. 55. The State Boards were directed to deliver to Aerojet a fee simple deed to the lands *subject to*

applicable statutory rights and reservations as provided for in paragraph 8(a) of the Lease-Option Agreement. (emphasis supplied) 318 F.Supp. at 66.

The State Boards appealed to the United States Court of Appeals for the Fifth Circuit. *In the Court of Appeals, neither the State Boards nor Aerojet raised the applicability of §253.111, Florida Statutes, to the 1961 agreement.* On December 9, 1971, the Court of Appeals affirmed the District Court's summary judgment and decree of specific performance. *Aerojet-General Corporation v. Askew,* 5 Cir., 1971, 453 F.2d 819.

This Court, on October 12, 1972, denied the State Boards' petition for writ of certiorari. *Askew v. Aerojet-General Corporation,* 409 U.S. 892 (1972).

The impact of §253.111, Florida Statutes, upon the 1961 lease-option agreement was never raised nor considered nor passed upon in the specific performance litigation between Aerojet and the State Boards. See, *Aerojet-General Corporation v. Askew,* 5 Cir., 1973, 476 F.2d 184., 186, n. 1.

E. *The Issuance of the Commissioner's Deed*

On June 20, 1972, the District Court appointed the Clerk of the United States District Court for the Southern District of Florida as a Commissioner for the purpose of executing a deed to the subject lands in favor of Aerojet. The Commissioner, on June 21, 1972, received from Aerojet's attorneys a cashier's check for $1,246,308.88. Upon

the receipt of the cashier's check, the Commissioner executed a deed in the name and on behalf of the State Boards, which deed was delivered to Aerojet's attorneys. The cashier's check was delivered to the State Boards.

F. *The Mandamus Action*

On June 9, 1972, Dade County instituted a mandamus proceeding in the Supreme Court of Florida against the State Boards. The mandamus petition recited the execution of the lease-option agreement, the exercise of the option, and the outcome of the specific performance action. It closed by asserting Dade County's right, under §253.111, Florida Statutes, of first refusal to the land described in the 1961 agreement.

The State Boards, on June 9, 1972, waived notice of hearing and consented to the Florida Supreme Court's issuance of an alternative writ of mandamus. The alternative writ issued on June 12, 1972. On June 22, 1972, the State Boards filed a return to the alternative writ which recited the federal court's directive to the State Boards to issue a deed to Aerojet as the basis for its refusal to offer the land to Dade County first.

On June 22, 1972, the State Boards sought to bring Aerojet into the mandamus proceeding (Florida Supreme Court Case Number 42,461) as a third-party respondent by means of a third-party complaint. The following day, June 23, 1972, Dade County asked the Florida Supreme Court to extend its previously issued alternative writ of mandamus to include Aerojet.

Aerojet moved the Florida Supreme Court to dismiss and/or quash the State Boards' third-party complaint and also opposed Dade County's effort to extend the alternative writ. On October 11, 1972, the Florida Supreme Court granted Aerojet's motion to dismiss and/or quash the third-party complaint and denied Dade County's motion for an extension of the alternative writ to include Aerojet.

On June 27, 1972, Aerojet moved the Florida Supreme Court for leave to file a memorandum of law as *amicus curiae.* That memorandum was attached to the motion which was granted on July 7, 1972. After arguing that Aerojet could not properly be brought into the mandamus proceeding, the Aerojet *amicus* memorandum advanced the following legal arguments:

(1) Dade County was not in a position to assert a claim under §253.111, Florida Statutes, to the disputed land because it had not formally adopted a plan of development of the lands for a public purpose;

(2) §253.111, Florida Statutes, which was enacted in 1965, could not apply to the 1961 lease-option agreement;

(3) Because the State Boards no longer had title to the disputed lands, Dade County could not properly maintain a mandamus proceeding against them;

(4) Dade County's mandamus action was untimely because it had been brought after the Court of Appeals' decision sustaining the District Court's decree of specific performance;

(5) Dade County and the State Boards were engaged in a friendly lawsuit designed to undermine Aerojet's title to the disputed property;

(6) The mandamus proceeding was moot because Aerojet had already received a deed to the land; and

(7) *The doctrine of res judicata operated to shield Aerojet from any liability to the State Boards or the County* (emphasis supplied).

The Florida Supreme Court, on October 11, 1972, issued the peremptory writ of mandamus sought by Dade County. *State of Florida ex rel. Metropolitan Dade County v. Askew,* Fla., 1972, 267 So.2d 827. After outlining the execution of the 1961 agreement, the closing of Aerojet's solid rocket fuel facility in June, 1967, the exercise of the purchase option by Aerojet in September, 1969, the refusal of the State Boards to convey the land to Aerojet, and the course of the federal specific performance suit brought by Aerojet against the State Boards, the Florida Supreme Court implicitly rejected Aerojet's res judicata argument as follows:

> "Because these opinions do not touch upon the contentions raised in the present mandamus proceeding, we do not discuss them in detail here." 267 So.2d at 828.

The Florida Supreme Court concluded that the phrase "subject to applicable statutory rights and reservations *in effect on date of conveyance"* (emphasis supplied) which appeared in paragraph 8(a) of the 1961

agreement included Dade County's right of first refusal under §253.111, Florida Statutes. It noted:

> "It is urged that Fla. Stat. Section 253.111, F.S.A. is inapplicable to the present transaction because the contract between Aerojet and the Trustees was entered into some four years prior to enactment of the statutory provision. We agree that if the problem were purely one of statutory construction, this argument would be entitled to serious consideration. *However, our study of the contract itself leads us to conclude that the parties intended that subsequently enacted statutes be taken into consideration . . .*" (emphasis supplied) 267 So.2d at 829.

The Florida Court's opinion closed with the following directive:

> "Since both methods by which the option may be exercised are expressly made subject to applicable statutory rights and reservations in effect on date of conveyance or contract to purchase, we are of the view that Fla. Stat. Section 253.111, F.S.A., which is presently in effect, must be complied with before the parties may complete their transaction.
>
> "Accordingly, the writ of mandamus heretofore sought by Dade County is issued and the Board of Trustees of the Internal Improvement Trust Fund is ordered to offer the land to Dade County in accord with the provisions of Fla. Stat. Section 253.111, F.S.A. Let the peremptory writ issue." 267 So.2d at 829.

Acting pursuant to the Florida Supreme Court's decision of October 11, 1972, the Board of County Commissioners of Metropolitan Dade County, Florida, resolved to offer to purchase the disputed lands from the State Boards. That same day, the State Boards, in return for Dade County's check for $1,246,308.88 and a copy of the authorizing resolution, executed and delivered a deed to the disputed lands in favor of Dade County. The recordation of that deed was shortly thereafter enjoined by the District Court. *Aerojet-General Corporation v. Askew*, N.D. Fla., 1973, 355 F.Supp. 928.

G. *Aerojet's Declaratory Judgment Action*

Eleven days after Dade County had instituted the mandamus proceeding, Aerojet, on June 20, 1972, brought suit in the District Court against the State Boards, Dade County, the Dade County Commissioners, and the Dade County Attorney. Federal jurisdiction was premised upon both diverse citizenship (28 U.S.C. §1332) and a federal question (28 U.S.C. §1331). The complaint, and several amendments thereto, informed the District Court of the progress of the mandamus proceeding in the Florida Supreme Court. Aerojet asked the District Court to declare §253.111, Florida Statutes, inapplicable to the December 21, 1961, agreement or that, if applicable, was unconstitutional as violative of Article I, Section 10, United States Constitution. In addition, Aerojet asserted that, by reason of the outcome of the federal specific

performance action, the doctrine of res judicata barred Dade County from asserting its §253.111, Florida Statutes, claim to the land in dispute.

The District Court, on January 8, 1973, *sua sponte* stayed further proceedings in Aerojet's declaratory judgment suit and suggested that the parties repair to the Florida state courts for a determination of "dispositive questions of state law." Aerojet immediately appealed to the Court of Appeals from the District Court's order of January 8, 1973.

Dade County, on January 10, 1973, filed a quiet title action against Aerojet in the Eleventh Circuit Court of Florida. Aerojet removed that suit to the Southern District of Florida upon grounds of diverse citizenship. On March 5, 1973, the Court of Appeals reversed the Northern District's order of abstention and directed that Court to proceed to the merits of the controversy after reinstating its injunction against any suits challenging Aerojet's title in any other court. *Aerojet-General Corporation v. Askew*, 5 Cir., 1973, 476 F.2d 184. The Southern District Court, on March 14, 1973, *sua sponte* transferred Dade County's removed quiet title suit to the Northern District Court, where it was consolidated with Aerojet's declaratory judgment action.

H. *The District Court's Decision*

The District Court, on November 21, 1973, rendered its decision in favor of Aerojet and against Dade County. *Aerojet-General Corporation v. Askew*, N.D. Fla., 1973, 366 F.Supp. 901. In ruling that §253.111, Florida Statutes,

was unconstitutional if applied to the December 21, 1961, agreement, the District Court reasoned that Aerojet, in entering into that contract, could not have contemplated a subsequently enacted Florida statute affording Dade County a right of first refusal to the disputed land (despite any language to the contrary in the contract.) 366 F.Supp. at 906-908. With respect to Aerojet's claim that res judicata barred Dade County from asserting a claim under §253.111, Florida Statutes, the District Court, after conceding that Florida law was controlling, simply refused to accord authoritative stature to the Florida Supreme Court's mandamus decision, declaring:

> "While it may be that there is Florida authority with regard to the issue of res judicata, it is the view of this Court that the recent mandamus action before the Florida Supreme Court on certain facts relevant to this case simply is not such authority, implicitly or otherwise. It is certainly well settled that Aerojet as an amicus curiae would not be bound. Moore's Federal Practice 0.411(6), 1551." 366 F.Supp. at 908.

Having so declared, the District Court proceeded to review the Florida body of law involving res judicata, and to conclude that, under Florida law, Dade County was barred by the outcome of the federal specific performance action from asserting its §253.111, Florida Statutes, claim. 366 F.Supp. at 910-911.

I. *The Court of Appeals' Decision*

On April 21, 1975, the Court of Appeals, in an opin-

ion authored by Judge Ainsworth, affirmed the judgment of the District Court. *Aerojet-General Corporation v. Askew,* 5 Cir., 1975, 511 F.2d 710. In so ruling, however, the Court of Appeals departed from the reasoning of the District Court in several significant respects:

(1) Unlike the District Court, the Court of Appeals held that *federal law* (*not* state law) governed the question of whether the federal specific performance judgment was res judicata in this action. 511 F.2d at 715-718.

(2) Under the *federal* law of res judicata, Dade County, which, according to the Court of Appeals, was "virtually represented" by the State Boards in the federal specific performance action, could not assert in this action its §253.111, Florida Statutes, claim to the disputed land. 511 F.2d at 718-720.

(3) The Florida Supreme Court's construction of the 1961 contract in relation to §253.111, Florida Statutes, was not deserving of respect in the federal courts because of the "non-adversary" nature of the mandamus proceeding. 511 F.2d 720-721.

(4) Paragraph 9(a) of the 1961 contract referred only to the reservation of certain interests in phosphate, minerals, metals, gas and oil (§270.11, Florida Statutes) and not to a county's right of first refusal under §253.111, Florida Statutes. 511 F.2d at 721-723.

(5) The Court of Appeals' belief in the correctness of its interpretation of §253.111, Florida Statutes, was reinforced by its certainty that, if the statute were con-

strued as Dade County contended, and as the Florida Supreme Court had agreed was the correct construction, it would violate the Impairment of Contract Clause of the United States Constitution. 511 F.2d at 723.

Judge Roney concurred specially as follows:

> "I concur in the result reached by Judge Ainsworth's opinion and most of what it says. I have serious doubt as to the decision that the Trustees of the Internal Improvement Fund and Dade County were in such relationship as to make the first lawsuit *res judicata* as to Dade County. Concurring in the decision that F.S.A. §253.111 cannot constitutionally prevent the relief granted to Aerojet in this case, however, makes my difference as to the *res judicata* effect of the first lawsuit of no consequence." 511 F.2d at 723.

V SUBSTANTIALITY OF ISSUES PRESENTED

A. *Res Judicata In Diversity Cases — Federal or State Law?*

In *Heiser v. Woodruff,* 327 U.S. 726 (1946), this Court expressly reserved its decision on whether res judicata in diversity cases is to be governed by state or federal law:

> "We need not consider whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of res judicata applied in the federal courts, in diversity of citizen-

> ship cases, under the doctrine of Erie R. Co. v. Tompkins, 304 U.S. 64; cf. Guaranty Trust Co. v. York, 326 U.S. 99; Holmberg et al. v. Armbrecht, 66 S.Ct. 582, can be other than that of the state in which the federal court sits." 327 U.S. at 731.

The several Courts of Appeals have arrived at varying solutions to this problem. In this case, the Fifth Circuit concluded that the prior specific performance action (in the federal court because of diverse citizenship) would be given res judicata effect according to *federal* rather than state law. The Fifth Circuit's opinion explicitly rejected (511 F.2d 716-717, footnote 8) a contrary line of decisions emanating from the Third Circuit: *Hartman v. Time, Inc.*, 3 Cir., 1947, 166 F.2d 127, 137-8, cert. denied, 334 U.S. 838 (1948); *Blum v. William Goldman Theatres, Inc.*, 3 Cir., 1949, 174 F.2d 914, 915; *Murphy v. Landsburg*, 3 Cir., 1973, 490 F.2d 319, 322 (footnote 4), cert. denied, 94 S.Ct. 1941 (1974); *Hassenplerg v. Victor Lynn Lines, Inc.*, E.D.Pa., 1947, 71 F.Supp. 70, 71.

The Second Circuit's position in this regard is not easily susceptible of categorization. In *Kern v. Hettinger*, 2 Cir., 1962, 303 F.2d 333, 340, that Court held that, as a consequence of the dismissal of a federal diversity action in California for failure of the plaintiff to prosecute (Rule 41(b), Federal Rules of Civil Procedure), a subsequent diversity action brought in New York was barred by res judicata. The *Kern* decision explicitly ruled that federal, rather than state, law governed the res judicata effect of a Rule 41(b) dismissal of a diversity suit. Recently, however, the Second Circuit has appeared to restrict the scope

of its *Kern* doctrine. In *United States v. Frank*, 2 Cir., 1974, 494 F.2d 145, the Court noted:

> "Kern v. Hettinger, *supra,* held *only* that whether a dismissal in a diversity action by a federal district court in California was to be read as being with or without prejudice must be determined in accordance with F.R. Civ. P. 41 rather than by the California state rule. Citing Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958), *the court ruled that in a clash between state law principles and the Federal Rules of Civil Procedure, the Federal Rules would prevail.* See, Hanna v. Plumer, 380 U.S. 460 (1965)." (emphasis supplied) 494 F.2d at 159-160.

The instant case does *not* present a clash between state law principles and the Federal Rules of Civil Procedure. By rejecting the supremacy of the Florida law of res judicata in the factual context of this controversy, the Fifth Circuit departed from the teachings of this Court in *Erie R. Co. v. Tompkins* and *Guaranty Trust Co. v. York*, supra, that in diversity actions federal courts are equivalent, as far as the applicable substantive law is concerned, to state courts. Furthermore, the Fifth Circuit's departure from this Court's established policy was not necessary to maintain *any* of the essential institutional characteristics of the federal judicial system as those characteristics have been embodied in federal statutes or procedural rules.

Nothing less than the continued viability of *Erie R.*

Co. v. Tompkins, supra, is at stake in this matter. Consequently, this Court should give plenary consideration to the issue of whether federal or state law governs the res judicata effect of a prior judgment in a federal diversity action upon a subsequent federal diversity proceeding.

B. *The "Non-Adversary" Nature of the Mandamus Proceeding.*

After going to extraordinary lengths (511 F.2d 720-721) to establish that the federal courts were not bound by judgments rendered in "non-adversary" state court proceedings, the Court of Appeals found that the Florida Supreme Court mandamus proceeding was "non-adversary" in nature on the basis of the following reasoning:

> "Respect for the integrity of the courts of the states requires that the federal courts exercise great caution in questioning the non-adversary nature of a state court proceeding. In the present case, however, the Deputy Attorney General of Florida admitted to the District Judge that the relationship between the state boards and Dade County was not an adversary one in the state court mandamus action.[12] Under the circumstances, we are not obliged to follow the state court decision in favor of Dade County." 511 F.2d at 721.

Footnote 12 of the Court of Appeals opinion read as follows:

> "The following colloquy occurred during the

District Court's hearing on Aerojet's motion for summary judgment:

> "THE COURT: The facts in this case just don't bear out your statement. I will agree with you that as far as a decision of This Court is concerned what went on between the Attorney General's office, the Attorney General of Florida and Dade County has nothing whatever to do with this case, but don't attempt to make me think that there weren't some shuffling and finagling going on between Dade County and the Attorney General's office. That is impossible for me to fathom.
>
> "MR. RICHARD [Counsel for defendants]: Your Honor, I would never attempt to tell you that — [.]" 511 F.2d at 721

Predicated solely upon the foregoing excerpt from the transcript of the District Court's summary judgment hearing, the Court of Appeals' determination that the Florida Supreme Court proceeding was "non-adversary" in nature does not withstand either objective or in-depth analysis for the following reasons:

(1) The Court of Appeals' opinion inexplicably ignored the efforts of Dade County and the State Boards to each bring Aerojet into the mandamus proceeding as a party and Aerojet's determined efforts to stay out of that action. Clearly, if Dade County and the State Boards had wanted to "manufacture" a pronouncement of Florida law adverse to Aerojet's interests, they would not

have sought to enlarge the mandamus proceeding to include Aerojet.

(2) The Court of Appeals' opinion also inexplicably ignored Aerojet's *amicus curiae* memorandum submitted to the Florida Supreme Court in the mandamus proceeding (after Dade County and the State Boards had failed to involve Aerojet within the suit as a party) and the Florida Court's rejection of the specific arguments made in that memorandum. Clearly, Aerojet's participation in the Florida Supreme Court's mandamus proceeding, albeit as *amicus curiae,* negates any notion that the mandamus proceeding was "non-adversary" in nature.

(3) The hearing excerpt which appeared in Footnote 8 of the Court of Appeals' opinion does not support the conclusion that the mandamus proceeding was non-adversary in nature. First, Mr. Richard, then Deputy-Attorney-General of Florida, has at no time represented Dade County in this or in any other action. His statement cannot be deemed a concession by Dade County. Second, at the District Court's hearing on August 22, 1973, in this action, Mr. Richard appeared as counsel solely for the two State boards whose legal interests in the disputed land had been terminated by the judgment in the specific performance action. And third, the thrust of Mr. Richard's truncated sentence to the District Judge was merely that in the context of the controversy between Aerojet and Dade County, the State Boards were "rooting" for Dade County and the public ownership of the lands for park purposes.

(4) The Court of Appeals' opinion is in direct conflict with this Court's opinion in *Commissioner of Internal*

Revenue v. Estate of Bosch, 387 U.S. 456 (1967). In *Bosch,* this Court held that the decisions of state *trial* courts, in proceedings to which the United States had not been a party, were not binding upon the federal courts and the Internal Revenue Service in the context of the administration of the federal estate tax statute; only state supreme court decisions would be afforded binding effect. This Court rejected the United States' argument that the decisions of state trial courts be deemed binding only if they had been rendered in "adversary" proceedings:

> "Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of Erie R. Co. v. Tompkins, supra, where state law as announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, viz., the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court the federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956).

> *"We believe that this would avoid much of the uncertainty that would result from the "non-adversary" approach and at the same time would be fair to the taxpayer and protect the public revenue as well."* (emphasis supplied) 387 U.S. at 465.

Here, the Court of Appeals, in disregard of the *Bosch* rationale, improperly injected the "non-adversary test" into a situation in which the highest court of the State, the Supreme Court of Florida, had authoritatively interpreted Paragraph 8 of the 1961 agreement in relation to §253.111, Florida Statutes, after considering the lengthy and comprehensive amicus memorandum submitted by Aerojet.

(5) If the Court of Appeals was genuinely concerned over the alleged "non-adversary" nature of the Florida Supreme Court's mandamus proceeding, it could and should have certified to that Court, pursuant to §25.031, Florida Statutes, and Rule 4.61, Florida Appellate Rules, the issue of the meaning of Paragraph 8 in the 1961 agreement. Such a certification would have assured the Court of Appeals of a truly "adversary" proceeding in the Florida Supreme Court and would have been entirely consistent with this Court's endorsement of the certification technique in *Lehman Brothers v. Schein,* 416 U.S. 386 (1974).

By tagging the Florida Supreme Court's mandamus proceeding as "non-adversary" in nature, the Court of Appeals saw its way clear to disregard the Florida Supreme Court's construction of the 1961 agreement in relation to

§253.111, Florida Statutes. In so doing, the Court of Appeals struck at the very foundation of the concept of federalism embodied in *Erie Railroad Company v. Tompkins,* supra. This Court is respectfully asked to give its plenary consideration to whether the mandamus proceeding in the Florida Supreme Court was correctly labeled "non-adversary" and thereby stripped of any authoritative status in the federal court system.

C. *The Imperative to Follow State Decisional Law in Contract Clause Cases.*

Atlantic Coast Line Railroad Company v. Phillips, 332 U.S. 168 (1947), a decision relied on by the County but not mentioned by the Court of Appeals, arose when the State of Georgia assessed an income tax against the railroad. In 1833, the Georgia Legislature had enacted a statute granting a charter to the Georgia Railroad Company. Section 15 of the charter act provided:

> "The stock of the said company and its branches shall be exempt from taxation for and during the term of seven years from and after the completion of the said railroads or any one of them; and after that, shall be subject to a tax not exceeding one half percent per annum on the net proceeds of their investments."

That charter constituted a contract between the State of Georgia and the railroad. In 1937, Georgia imposed a 5½% corporate income tax. No claim was made against the Atlantic Coast Line, a lessee of the Georgia Railroad, until 1941. In 1943, the State assessed against the railroad

deficiency corporate income taxes computed at the same 5½% rate paid by all corporations. The railroad resisted the assessment on the ground that the attempt by Georgia to impose the tax was an impairment of the contractual obligations assumed by the State through §15 of the 1833 Charter. The Supreme Court of Georgia sustained the assessment, 200 Ga. 856, 38 S.E.2d 774. In so doing, it interpreted the 1833 Charter to mean that the tax exemption granted therein related to property taxes and did no more than limit the measure of such taxes on the railroad. The Georgia Court found that the exemption did not apply to corporate income taxes and therefore did not bargain away the power of the Georgia Legislature to impose such a tax. The railroad appealed to this Court on the theory that the imposition of the income tax constituted an unconstitutional impairment of the 1833 Charter in violation of Article I, Section 10, United States Constitution. This Court upheld the assessment and in so doing observed:

> "A claim that a State impairs the obligation of contract is an appeal to the United States Constitution, and cannot be foreclosed by a State Court's determination whether there was a contract or what were its obligations. But while it is true that we are not bound by the construction of local statutes by the local courts in deciding the Constitutional question, 'yet when we are dealing with a local policy, like a system of taxation, we should be slow to depart from their judgment, if there was no real oppression or manifest wrong in the result'."

* * * * * *

> "It is not for us to read such a local law with independent but innocent eyes, heedless of a construction placed upon it by the local court. Such a tax provision is not a collection of abstract words. In seeking the meaning conveyed by a local enactment it must be viewed as part of the whole texture of local laws and the economy to which they apply. The language draws to itself presuppositions not always articulated, and even what is expressed in words may carry meaning to insiders which is not within the sure discernment of those viewing the law from a distance. And so we are not prepared to say that the Georgia Supreme Court was 'manifestly wrong'." 332 U.S. at 170-1.

The Court of Appeals in the instant case relied upon an opinion of the Florida Attorney-General rendered in 1962, to the effect that the "statutory rights and reservations" referred to in Paragraph 8 of the 1961 agreement were those mineral and other similar rights specified in §270.11, Florida Statutes. 511 F.2d at 723. In so doing, the Court of Appeals refused to follow the decision of the Florida Supreme Court in the mandamus proceeding to the effect that the "statutory rights and reservations" referred to in Paragraph 8 of the 1961 agreement included Dade County's right of first refusal to the disputed land under §253.111, Florida Statutes. Under this Court's decisions in *Erie* and *Atlantic Coast Line*, supra, federal courts are *not* free to disregard the decisions of the highest state courts and accept instead those issued by the states' attorneys-general. Consequently, the Court of Appeals, in the absence of a supportable determination of "manifest

wrongness," committed a grave error when it declined to adopt the Florida Supreme Court's view that the parties to the 1961 agreement intended to incorporate subsequently enacted statutes, such as §253.111, Florida Statutes, into their relationship.

The decision of the Court of Appeals in this case has severely undermined this Court's policy, as expressed in *Atlantic Coast Line*, supra, that federal courts, when considering claims under the Contract Clause, follow authoritative decisions of the highest state courts as to the meanings of state statutes and contracts unless such decisions are shown to be "manifestly wrong." Consequently, this Court should give plenary consideration to whether the Court of Appeals correctly decided that the Florida Supreme Court was "manifestly wrong" when it declined to follow the Florida Supreme Court's interpretation of the clear language contained in Paragraph 8 of the 1961 agreement.

VI. CONCLUSION

Judge Ainsworth's opinion for the Court of Appeals in this case opened with the following statement:

> "Important questions concerning the doctrine of res judicata and the Contract Clause of the United States Constitution are presented in this much-litigated dispute over title to a large tract of land in Dade County, Florida." 511 F.2d at 712.

Dade County respectfully urges that the issues presented in this case are sufficiently important to warrant plenary consideration by this Court. Probable jurisdiction of this appeal should be noted and further proceedings should be had.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Jurisdictional Statement of Appellants were mailed this 22nd day of August, 1975, to the following:

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